

No: 48901-5
Clark County Superior Court No: 15-1-02522-8

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BILL CHARLES BROWN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Superior Court Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities	i-ii
A. INTRODUCTION.....	1
B. ASSIGNMENT OF ERROR.....	1
C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR	1
D. SUMMARY OF ARGUMENT	2
E. STATEMENT OF THE CASE.....	2-4
F. ARGUMENT	4-14
1. The Threat Made by Mr. Brown was not Communicated to Ms. Clemons	5
2. The State Failed to Prove any Words or Conduct, Distinct from the Alleged Threat, Supporting a Reasonable Fear that the Threat Would be Carried Out.....	9
G. CONCLUSION.....	14-15
H. Certificate of Service.....	16

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<i>Pac. NW Ann. Conf. of the United Methodist Church v. Walla Walla County</i> 82 Wn.2d 138, 508 P.2d 1361 (1973).....	4-5
<i>Roake v. Delman</i> ___ Wn.App. ___ (2016WL3336919) (2016)	11-12
<i>State v. Barragan</i> 102 Wn.App. 754, 9 P.3d 942 (2000).....	10

<i>State v. C.G.</i> 150 Wn.2d 604, 80 P.3d 594 (2003).....	5-6, 8-10
<i>State v. E.J.Y.</i> 113 Wn.App. 940, 55 P.3d 673 (2002).....	10-11
<i>State v. J.P.</i> 149 Wn.2d 444, 69 P.3d 118 (2003).....	12
<i>State v. Kiehl</i> 128 Wn.App. 88, 113 P.3d 528 (2005).....	10
<i>State v. Ragin</i> 94 Wn.App. 407, 972 P.2d 519 (1999).....	10
<i>State v. Rodgers</i> 146 Wn.2d 55, 43 P.3d 1 (2002).....	15
<i>State v. Shipp</i> 93 Wn.2d 510, 610 P.2d 1322 (1980).....	4
<i>State v. Stockton,</i> 97 Wn.2d 528, 647 P.2d 21 (1982) (en banc).....	4
<i>State v. Williams</i> 144 Wn.2d 197, 207, 26 P.3d 890 (2001).....	5
<u>FEDERAL CASES</u>	
<i>Burkes v. United States</i> 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).....	15
<i>Watts v. United States</i> 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 644 (1969).....	5
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9A.46.020	<i>passim</i>
RCW 7.90	11

A. INTRODUCTION

Appellant, Bill Charles Brown, was charged on December 22, 2015, with Intimidating a Public Servant and Harassment – Death Threat to a Criminal Justice System Participant. (CP 1). On the day of his bench trial, March 21, 2016, the State filed an Amended Information which charged a single count of Felony Harassment Involving Threat to Criminal Justice System Participant. (CP 3). After an extremely short bench trial,¹ Mr. Brown was found guilty. (VRP 78). Sentence was set over to April 28, 2017, and imposed on that date. (VRP 82); (CP 7).

B. ASSIGNMENT OF ERROR

The Superior Court erred by finding Mr. Brown guilty of Harassment of a Criminal Justice Participant because there was incongruity between the threat allegedly made and the threat communicated, and it disregarded the absence of words or conduct supporting a reasonable fear.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. The State failed to prove beyond a reasonable doubt that the specific threat made by Mr. Brown was communicated to and feared by the alleged victim.**
- 2. The State failed to adduce any evidence of “words or conduct,” distinct from the threat itself, that would “place the person threatened in reasonable fear that the threat would be carried out.”**

¹ Without including the portion of the verbatim report of proceedings where the superior court considered the evidence and pronounced judgment, the verbatim report of proceedings for the trial was only 72-pages; and the trial itself lasted a little over two hours.

D. SUMMARY OF ARGUMENT

Mr. Brown's conviction should be reversed because the trial court erred in two significant ways. First, it convicted Mr. Brown even though it held that there was insufficient evidence to conclude beyond a reasonable doubt that Mr. Brown spoke the specific threat which was actually conveyed to the alleged victim. Second, the trial court erroneously concluded that Mr. Brown made the alleged victim reasonably afraid that the threat would be carried out, notwithstanding the conspicuous absence of any testimony regarding words or conduct of Mr. Brown, of which the alleged victim was aware, that supported her allegedly reasonable fear.

E. STATEMENT OF THE CASE

Billy Charles Brown was under Department of Corrections ("DOC") supervision on December 17, 2016, when he was ordered to provide a urine sample by his probation officer, Bethany Clemons. (CP 5); (VRP 12-13). When he acted unwilling, he was told that he needed to provide a urinalysis or he would be taken to jail. (VRP 12). Mr. Brown refused to provide the urinalysis, and was taken to jail. (VRP 14). While being taken into custody for transportation to jail, Mr. Brown said, in the presence of his probation officer, that he was frustrated because he was not getting the help that he needed. (VRP 14, 20). He did not make any threats or act physically aggressive to Ms. Clemons at that time.

Mr. Brown has a history of schizophrenia. (VRP 37, 47). At the time of the alleged incident, he was off his medication for about a month. (VRP 47). Shortly after arriving at jail, Mr. Brown asked to speak with a mental health counselor. (CP 5); (VRP 28, 50). Virginia Walker met with Mr. Brown based on his request for services at the jail. (VRP 28). During Ms. Walker's interview with Mr. Brown, she claims to have heard Mr. Brown threaten to kill his probation officer, Bethany Clemons. (VRP 31). She claimed that he said "he might kill himself when he got out...But that he might also kill her." (VRP 31). However, Ms. Walker's report from the same day told a different story. (VRP 37-38) The report read that Mr. Brown "[d]enies any current thoughts of self-harm but goes on to state there are lots of ways he could do it when he gets out. He feels he may want to end his own life – or hurt his probation officer because he is mad at her." (VRP 38, 76).

Ms. Walker communicated Mr. Brown's threat to Sergeant Ashworth, whom she described as being "next up in her chain of command." (VRP 32). Ms. Walker never spoke directly to Ms. Clemons about the threat. (VRP 38-39). Ms. Walker's "report" of the threat was that Mr. Brown "wanted to end his life or hurt his probation officer because he was mad at her." (VRP 38). A threat to kill was not mentioned anywhere in Ms.

Walker's report. (VRP 38). Ultimately, Lisa Gay communicated to Ms. Clemons that Mr. Brown had *threatened to kill her*. (VRP 18).

F. ARGUMENT

The Court should reverse Mr. Brown's conviction and dismiss the charge because the evidence was insufficient to support a conviction. The trial court's own words revealed its determination that the actual threat it believed was made by Mr. Brown was not conveyed to the alleged victim. Furthermore, there was no evidence of words or conduct, aside from the miscommunicated threat, which supported a reasonable fear that the actual threat would be carried out.

As a preliminary matter, it is worth remembering that the harassment statute must be strictly construed because it is a penal statute. *State v. Stockton*, 97 Wn.2d 528, 533, 647 P.2d 21 (1982) (en banc) ("Statutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law, as required by due process.") (citing *State v. Shipp*, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980)). "To strictly construe a statute simply means that given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option." *Pac. NW Ann. Conf. of the United Methodist Church v. Walla Walla County*, 82 Wash.2d 138, 141, 508 P.2d 1361 (1973).

The command that the harassment statute be strictly construed as a penal statute is doubly important in light of the fact that it involves the regulation of speech. *State v. Williams*, 144 Wn.2d, 197, 207, 26 P.3d 890 (2001) (“a statute[,] ... which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind.”) (citing *Watts v. United States*, 394 U.S. 705, 707, 89 S.Ct. 1399, 22 L.Ed.2d 644 (1969)). The Court should look carefully at how the harassment statute was applied to Mr. Brown’s communication to a state psychologist while in search of mental health counseling, because the alleged threat was inaccurately conveyed and there was insufficient evidence of words or conduct supporting Ms. Clemons’s alleged fear.

1. The Threat Made by Mr. Brown was not Communicated to Ms. Clemons

The Washington State Supreme Court observed that the words “the threat” from RCW 9A.46.020, “are key to the statute’s meaning.” *State v. C.G.*, 150 Wn.2d 604, 609, 80 P.3d 594 (2003) (en banc). The statute reads, in relevant part:

- (1) A person is guilty of harassment if:
 - (a) Without lawful authority, the person knowingly threatens:
 - (i) To cause bodily injury immediately or in the future to the person threatened or to any other person; or
 - ...
 - (b) The person by words or conduct places the person threatened in reasonable fear that

the threat will be carried out. "Words or conduct" includes, in addition to any other form of communication or conduct, the sending of an electronic communication.

RCW 9A.46.020 (emphasis added).

To prove a misdemeanor violation, the State must prove that a threat covered under 1(a) was made, and that the specific threat made was actually the one feared. *C.G.*, at 609. In the case of a threat to kill, which is normally punished as a felony under 9A.46.020(2)(b)(ii), a threat of "bodily injury" is also present in the "in the nature of a lesser included offense." *C.G.* at 611. Thus, a threat to kill which normally supports a felony conviction may be sufficient for a misdemeanor conviction where the alleged victim fears bodily injury rather than death. *Id.*

The Supreme Court's interpretation in *C.G.* of the importance of "the threat" language should not be read to eliminate the need of identity between threat communicated and threat feared. It merely acknowledges that a threat to kill also includes a threat of bodily injury. *C.G.*, at 611.

Mr. Brown Did not Utter a Threat to Kill, but a Threat to Kill was Communicated to Ms. Clemons and She Feared the Threat to Kill.

In the instant case, the status of the charge as a felony was dependent not upon the nature of the threat, but rather upon the fact that the alleged victim was a criminal justice participant. (CP 3). Judge Collier held that the State proved that Ms. Clemons was a criminal justice participant who

received a threat ...; but could “not find beyond a reasonable doubt that the threat was a threat to kill” but “[t]hat’s what got communicated to her...” (VRP 75-76). In other words, Judge Collier was not convinced beyond a reasonable doubt that Mr. Brown uttered a threat to kill, finding in fact that he had uttered the words “end his own life and hurt his probation officer.” (VRP 77); (CP 7).

Ms. Clemons’ fear, reasonable or not, was predicated upon an imaginary “threat to kill” which was mistakenly communicated to her by Lisa Gay. (VRP 16). Ms. Clemons specifically testified that she “[thought] the defendant had the ability to carry that threat out” in reference to the purported threat to kill. (VRP 17). On cross examination, she admitted that, to her, there is a big difference between a threat to kill and a threat to hurt, but insisted, *hypothetically*, she would have feared either threat. (VRP 24).

The trial court’s ruling disregarded, openly, but with laudable candor and humility,² the discrepancy between the threat made and the threat actually communicated. The trial court convicted Mr. Brown because it believed that Mr. Brown actually uttered a threat which would have been punishable *if* Ms. Clemons had learned of it. When suggesting that his ruling should be reviewed on appeal, Judge Collier said:

² Judge Collier’s comments when rendering judgment candidly reflected upon his vacillation between acquittal and conviction, (VRP 72), and indicated that “it would make sense” to have his ruling on the issue reviewed.

The question centers on my taking on this is – and I’m making the finding that the threat to do bodily harm in that level was not conveyed to her. It was conveyed to her the threat to kill. But I’m finding that a reasonable criminal justice participant would be fearful of the threat that was, in fact made.

(VRP 78).

Ms. Clemons’s Hypothetical Fear of a Threat to Hurt Her is Irrelevant

Whether Ms. Clemons would have feared a threat to hurt her is irrelevant because that threat was not communicated. “Whatever the threat, whether listed in subsection (1)(a) or a threat to kill as stated in subsection (2)(b), the State must prove that the victim was placed in reasonable fear that the same threat, i.e., “the” threat, would be carried out.” *C.G.*, at 609.

The Washington State Supreme Court’s ruling that a “threat to hurt” is included in a “threat to kill” like a lesser-included offense does not mean that the reverse is true. The miscommunication of an alleged “threat to hurt” as a “threat to kill” is an embellishment that dramatically transforms the character of the alleged threat and evokes a far more ominous sense of danger. The “reasonableness” of Ms. Clemons’ fear cannot be abstracted or isolated from the miscommunicated threat by concluding what she would have felt fear if the threat had been properly communicated. Ms. Clemons was told that Mr. Brown had threatened to kill her, but the trial court found that this threat, “the threat,” was not made by Mr. Brown. The conviction

should be reversed because it cannot be based on what *might* have happened *if* a particular threat was accurately conveyed. A conviction for harassment under RCW 9A.46.020 must be based on a reasonable fear of “the threat” which was communicated. *C.G.*, at 604,

2. The State Failed to Prove any Words or Conduct, Distinct from the Alleged Threat, Supporting a Reasonable Fear that the Threat Would be Carried Out.

If, for the time being, the Court were to disregard the dramatic inaccuracy in the communication of the alleged threat, there is still a significant deficiency in the evidence offered in support of the conviction. The State failed to elicit any evidence of words or conduct, independent from the miscommunicated threat itself, which would lead Ms. Clemons to reasonably believe that Mr. Brown would carry out the threat.

For a defendant to be found guilty of harassment under RCW 9A.46.020, there must be a showing that, beyond a reasonable doubt, the words or conduct of the defendant placed the person threatened in a "reasonable fear" that the specific threat would be carried out. RCW 9A.46.020(b). When a victim expresses a subjective fear that a threat directed at her will be carried out, that fear is analyzed for objective reasonableness. *State v. Barragan*, 102 Wn.App. 754, 9 P.3d 942 (2000) (citing *State v. Ragin*, 94 Wn.App. 407, 411, 972 P.2d 519 (1999)). The fear expressed by the victim must be a fear of the specific threat verbally

conveyed. *C.G.* at 604. “The State must prove that the threat made and the threat feared are the same.” *Id.* Where there is no evidence presented that indicates the victim was afraid that the threat would be carried out, the evidence is insufficient to support a charge of harassment. *See State v. Kiehl*, 128 Wn.App. 88, 94, 113 P.3d 528 (2005). “The person threatened must subjectively feel fear and that fear must be reasonable.” *State v. E.J.Y.*, 113 Wn.App. 940, 953, 55 P.3d 673 (2002).

The Words and Conduct Supporting a Reasonable Fear Must be Distinct from the Threat Itself

The structure of the statute leads to a conclusion that the “words and conduct” of (1)(b) be distinct from the pure speech of the threat of (1)(a). Any other such conclusion would render (1)(b) superfluous. Division One reached an analogous conclusion in interpreting a similar statutory scheme. *See Roake v. Delman*, __ Wn.App. __ (2016WL3336919) (2016). It wrote:

The plain language of the statute indicates that a SAPO petition must contain two substantive allegations: (1) “the existence of nonconsensual sexual conduct or nonconsensual sexual penetration” and (2) a statement of the “specific statements or actions ... which give rise to a reasonable fear of future dangerous acts.” The clauses are joined by the word “and,” indicating that both allegations must be included in the petition. ... the plain language of RCW 7.90.020 requires that a SAPO petition allege that nonconsensual sexual contact occurred and state ‘the specific statements or actions made at the same time of the sexual assault or

subsequently thereafter, which give rise to a reasonable fear of future dangerous acts...’ The ‘specific statements or actions’ must be separate from the sexual assault itself, because the requirement otherwise would be redundant. We must construe statutes to that “no portion is rendered meaningless or superfluous.”

Id. (internal citations omitted) (emphasis in original).

The harassment statute contains a conjunctive requirement similar to that of RCW 7.90.020—the requirement of proving a threat and then proving words or conduct that makes the alleged victim’s subjectively held fear one that society considers objectively reasonable. *State v. E.J.Y.*, 113 Wn.App. 940, 953, 55 P.3d 673 (2002). As Division One wrote regarding a sexual assault protection order under RCW 7.90 in *Roarke*, RCW 9A.46.020 must be construed so that “no portion is rendered meaningless or superfluous.” *Roake*, __ Wn.App. __ (citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). Allowing the actual words of the threat itself, absent other words or conduct, to support the reasonable fear, would render RCW 9A.46.020(1)(b) superfluous.

The State Failed to Adduce Evidence of Words or Conduct, Independent of the Threat, To Support a Reasonable Fear of the Threat Conveyed.

Mr. Brown’s alleged threat was communicated, at best, third-hand. Ms. Walker heard the alleged threat. (CP 5); (VRP 31). After hearing the threat, she communicated it to Sergeant Ashworth. (VRP 32). Ms. Clemons

ultimately heard the threat from a different person altogether, Lisa Gay (VRP 18). There was no evidence offered regarding how many other degrees of separation intervened between Mr. Brown and Ms. Clemons. There was no evidence that anything related to Mr. Brown's alleged demeanor or conduct was ever communicated to the alleged victim. Ms. Clemons' "fear" of Mr. Brown was supposedly "based off his history and how he was that day and then he has been non-compliant since I've supervised him." (VRP 16).

Defendant's History is Not the Basis for a Reasonable Fear

To the extent that Ms. Clemons' "fear," was based on Mr. Brown's criminal history, it is not reasonable. First, she admitted that had no history of threatening to kill anyone or actually attempting to kill anyone. (VRP 20). Second, there was no discussion in his "history" that he had ever been violent or aggressive to a probation officer, including herself. Ms. Clemons claimed he had assaults, obstruction, and resisting charges in his history. Yet, none of that behavior was exhibited during the day when she asked for the urinalysis and ordered him arrested and transported to jail.

Mr. Brown's Pre-Threat Behavior is not a Basis for a Reasonable Fear

Ms. Clemons indicated that Mr. Brown was "irritated" when asked to give a random urinalysis because he wanted to get to treatment. (VRP 12). Mr. Brown's own testimony confirmed that he told Ms. Clemons that he

needed to get to treatment and had to take a long bus ride to get there on time. (VRP 48). Ms. Clemons described Mr. Brown as “really frustrated” when he was sitting out in the lobby. (VRP 12). There was no testimony about Mr. Brown being aggressive or threatening toward anyone while sitting in the lobby. Nor was there any testimony by Ms. Clemons stating that Mr. Brown’s words or conduct was intimidating or threatening in any way.

When Mr. Brown was placed in cuffs for transport to the jail, Ms. Clemons described him as very upset and agitated; and she testified that he said he was not receiving the help that he needed. (VRP 14). Even under these circumstances, there was no testimony that he acted aggressively or threateningly toward her, or anyone else; and Ms. Clemons did not testify that she was afraid of him or intimidated by him at that time.

The Findings of Fact and Conclusion of Law Do Not Establish the Requirement of Words and Conduct

The trial court’s Findings of Fact omit any reference to “words or conduct” of Mr. Brown which might contribute to Ms. Clemons’ reasonable fear that the miscommunicated threat would be carried out. (CP 5).

The trial court’s conclusion of law #2 simply announces that Ms. Clemons’ fear was reasonable, but makes no reference to any words or conduct which would support a reasonable fear that Mr. Brown would act upon the miscommunicated threat. Mr. Brown believes that this conclusion

of law is contrary to the law requiring a showing of words or conduct aside from the threat itself in support of an alleged victim's purportedly reasonable fear.

Ultimately, the Court should reverse Mr. Brown's conviction because the State did not adduce sufficient evidence, distinct of the actual words of the threat itself, to support a finding that Ms. Clemons' subjectively held a reasonable fear that is objectively reasonable. A conviction for Harassment requires a showing of words or conduct in addition to the threat itself. No such showing was made in the instant case.

3. Upon Reversal of the Conviction, the Case Should be Remanded for Dismissal with Prejudice.

The remedy for the insufficient evidence is to remand the matter for dismissal, because “ ‘[i]f there is insufficient evidence to support a conviction, the Double Jeopardy Clause requires reversal and remand for judgment of dismissal with prejudice.’” *State v. Rodgers*, 146 Wn.2d 55, 60, 43 P.3d 1 (2002) (en banc) (citing *Burks v. United States*, 437 U.S. 1, 17-18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)).

G. CONCLUSION

The Court should reverse Mr. Brown's conviction and dismiss the charge with prejudice because the State failed to prove that Ms. Clemons feared the actual threat made by Mr. Brown; and it failed to show that his

words or conduct reasonably put her in fear of the threat he made. Even the trial court openly declared on the record that it was vacillating between acquittal and conviction. Such vacillation is reasonable doubt, and this Court's analysis of the harassment statute should lead it to conclude that insufficient evidence exists to support Mr. Brown's conviction.

Respectfully Submitted this 5 day of August, 2016.

LAW OFFICE OF BRET ROBERTS, PLLC.

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PROOF OF SERVICE

I, Bret Roberts, certify that, on this date:

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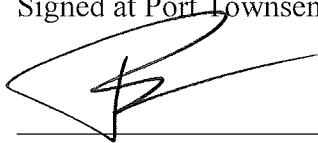
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I put a copy of appellant's brief in the mail to Billy Charles Brown, DOC #870297, at:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Port Townsend, Washington, on August 5 2016.

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